RECENT CASES.

AGENCY—LIABILITY OF PRINCIPAL—USURY OF AGENT—A woman left with an agent a sum of money to be loaned. He loaned the money at an usurious rate of interest. She did not know of the usury, nor did she receive any of the fruits of it. *Held:* The principal is not liable for the usury of the agent. Brown v. Johnson, 134 Pac. Rep. 590 (Utah 1913).

This follows the general proposition that the principal is liable only for those acts of the agent which were committed within the actual or implied authority given to him. Insurance Co. v. Cusick, 109 Pa. 157 (1885); Griswold v. Gebbie, 126 Pa. 353 (1889); Louchheim v. Davies, 148 Pa. 499 (1892); Markley v. Snow, 207 Pa. 447 (1904). Thus the principal has been held liable for the fraudulent representations of the agent made within the apparent scope of his authority and in the performance of the principal's business, Brooke v. Ry., 108 Pa. 529 (1885); but not for those outside the authority of the agent, Udell v. Atherton, 7 Hurl. & Nor. 171 (Eng. 1862). But the principal may be liable for the unauthorized acts of the agent if he subsequently ratifies them. Dempsey v. Chambers, 154 Mass. 330 (1891). The fact that the principal retains the fruits of the unauthorized acts of the agent has been held to imply ratification. Mundorff v. Wickersham, 63 Pa. 87 (1869); Hughes v. Bank, 110 Pa. 428 (1885). However persons dealing with an assumed agent are bound at their peril to ascertain the fact of the agency, and the extent of the authority. Hurley v. Watson, 68 Mich. 531 (1888); Sexsmith v. Siegel Cooper Co., 88 N. Y. Supp. 925 (1904).

BREACH OF PROMISE TO MARRY—ELEMENTS OF DAMAGE—In an action for breach of promise to marry, seduction and pregnancy effected by means of the promise, may be shown in aggravation of damages on the ground that mental anguish and humiliation are intensified thereby. But evidence of abortion, though procured at the instance of the defendant, is inadmissable. Nolan v. Gylnn, 142 N. W. Rep. 1029 (Iowa 1913).

The case follows the current of American opinion. Fidler v. McKinley, 21 Ill. 308 (1859); Haymond v. Saucer, 84 Ind. 3 (1882); Coil v. Wallace, 24 N. J. L. 291 (1854); Wilbur v. Johnson, 58 Mo. 600 (1875). *Contra:* Burks v. Shain, 2 Bibb 341 (Ky. 1811); Weaver v. Bachert, 2 Pa. 80 (1845); Perkins v. Hersey, 1 R. I. 493 (1851). In Wrynn v. Downey, 27 R. I. 454 (1906) the doctrine is criticised on the ground that it is the result of sentiment and based only on a *dictum* in Paul v. Frazier, 3 Mass. 71 (1843). The minority decisions hold as the parties are in *pari delicto* and as seduction may constitute a separate cause of action, the evidence ought not to be admitted, for otherwise the defendant would be twice subjected to vindictive damages. This occurred in Jarvis v. Johnson, 2 Ohio Dec. Reprints 312 (1860) where recovery by the plaintiff's father for seduction was not permitted to be shown in mitigation of damages in an action for breach of promise.

Generally, the damages recoverable for breach of promise are such as will compensate the plaintiff for benefits lost thereby. Coolidge v. Neat, 129 Mass. 146 (1880); Chellis v. Chapman, 125 N. Y. 214 (1891). Evidence of the defendant's social and financial condition is admissable. McPherson, 59 Mich. 33 (1886). However, evidence relating to the financial condition of the defendant's family will not be admitted. Miller v. Rosier, 3 Mich. 475 (1875). Injuries to the affections, humiliation, loss of social standing are elements of damage. Collins v. Mack, 31 Ark. 684 (1877).

An unsuccessful attempt to seduce may be shown in aggravation of damages. Kaufman v. Fye, 99 Tenn. 145 (1897). But evidence of seduction before the promise is not admissable. Espy v. Jones, 37 Ala. 379 (1861). If the plaintiff was seduced for the first time by the defendant, the latter may not prove in mitigation of damages her bad character subsequent to

the promise to marry and before the breach. Boynton v. Kellogg, 3 Mass. 189 (1807). Venereal disease acquired as the result of the seduction may be proved in aggravation of damages. Millington v. Loring, 6 Q. B. D. 190 (Eng. 1880). Similarly, the effect of pregnancy and childbirth upon bodily health may be considered. Wilds v. Bogan, 57 Ind. 453 (1877); *contra*, Tyler v. Salley, 82 Me. 128 (1889). But not the loss of time or cost of medical attendance. Giese v. Schultz, 53 Wis. 462 (1881).

COMMON CARRIER—WHEN LIABLE AS CARRIER OF WAREHOUSEMAN—A consignee allowed goods to remain in a freight car at a station fifty-three hours after notice of their arrival had been given to him by the railroad. The goods were destroyed by fire. *Held:* The railroad is not liable as an insurer, since the consignee has had a reasonable time in which to remove goods, but is liable only as a warehouseman. Rustad v. Great Northern Ry. Co., 142 N. W. Rep. 727 (Minn. 1913).

The liability of a common carrier as an insurer does not terminate until delivery to the consignee or until a reasonable time has elapsed after notice of arrival of goods. Briant v. Louisville & N. R. Co., 9 Ky. L. Rep. 47 (1887); Tallassee Falls Mfg. Co. v. Western Ry. of Ala., 29 So. Rep. 203 (Ala. 1900). At the termination of such a reasonable time the liability of the common carrier becomes that of warehouseman. The Titania, 124 Fed. Rep. 975 (1903); Berry v. West Va. & P. R. R. Co., 44 W. Va. 538 (1898). Where the facts are not in dispute the question of whether the time is reasonable is one of law for the court and depends upon the circumstances of the case.

Reasonable time has been held to be: three days for the removal of a consignment of tin, Tarbell v. Royal Ex. Shipping Co., 110 N. Y. 170 (1888); two days for removal of jewelry, Laporte v. Wells Ex. Co., 23 N. Y. App. Div. 267 (1897); one day for removal of paper, Hedges v. Hudson River R. Co., 49 N. Y. 223 (1872); one week for removal of lumber, Anniston R. Co. v. Ledbetter, 92 Ala. 326 (1890). Two hours was not held reasonable time for the removal of merchandise, Parker v. Milwaukee R. Co., 30 Wis. 689 (1872).

Some courts hold that notice to the consignee is not necessary to change liability of a common carrier from that of an insurer to that of warehouseman, Chic., R. I. & P. Ry. Co. v. Kendall, 72 Ill. App. 105 (1897); Hicks v. Wabash R. Co., 131 Iowa 295 (1906); Rice v. Hart, 118 Mass. 201 (1875). The general rule, however, is in accord with the principal case.

CONFLICT OF LAWS—BENEFICIAL ASSOCIATIONS—In a suit upon a policy or certificate of insurance in a state where the contract of insurance was made, and the issue being whether the business of the insurer was that of the old line or of the assessment variety with the effect of bringing it within, or taking it without a statute requiring all conditions to appear upon the policy itself, the law of the place where the contract was made, and not of the place of incorporation, must govern the determination of the issue. Marcus v. Heralds of Liberty, 241 Pa. 429 (1913).

A contract is to be construed according to the law of the place where it was entered into. Franklin Life Ins. Co. v. Morell, Ark. (1907); Mutual Life Ins. Co. v. Cohen, 179 U. S. 262 (1900); Mutual Life Ins. Co. v. Hill, 193 U. S. 551 (1903), unless a different place of performance is stipulated. Michaelson v. Security Mut. Life Ins. Co., 50 Fed. 224 (1907); Expressman's Mut. Ben. Assoc., 91 Md. 585 (1900). And a contract valid according to the law of the place where made, will be enforced in another state, even though not valid according to the law of the *forum*. Voorheis v. People's Mut. Ben. Soc., 91 Mich. 469 (1892), unless held to be against the public policy of the latter, Albro v. Manhattan Life Ins. Co., 119 Fed. 629 (1902). The statutes in force in the jurisdiction and at the time of the making of the contract are held to have been in the contemplation of the parties and therefore to condition the rights of the parties. Pritchard v.

Norton, 106 U. S. 124 (1882); Keatley v. Grand Frat., 82 Atl. Rep. 294 (Del. 1911); McDonald v. Barkers' Life Assoc., 154 Mo. 618 (1900).

In the principal case it was contended in vain by the defendant that the nature of its business had to be determined by its charter and the laws under which it was organized. Although the majority of cases apply the rules applicable to the construction of ordinary contracts to the construction of contracts of insurance between a beneficial or fraternal association and one of its members, yet there are a number of cases *contra*. They proceed upon the theory that by becoming a member of the association the individual is bound by the charter and by-laws of the association and also by the laws and statutes of the state wherein the association was organized. Supreme Lodge, New Eng. Order of Protection v. Hine, 82 Conn. 315 (1909); Supreme Lodge, K. of H. v. Naein, 60 Mich. 44 (1886); Fid. Mut. Life Assoc. v. Ficklin, 74 Md. 172 (1891); Fidelity Mut. Life Assoc. v. McDaniel, 25 Ind. App. 608 (1900); *cf.*, Equitable Life Assur. Soc. v. Fromshold, 75 Ill. App. 43 (1897).

CONTRACTS—CONSIDERATION—SUBSCRIPTION—The defendant subscribed $10,000 toward an endowment fund of an educational institution, promising to pay the same, if a certain sum was raised from other sources. *Held:* The promise is binding, for if work has been done or expenditures made upon the faith of, and in reliance upon the subscription, a consideration is thus furnished to support the promise. *In re* Converse's Estate, 87 Atl. Rep. 879 (Pa. 1913).

This case follows the universal rule Prest. Board of Foreign Mission v. Smith, 209 Pa. 361 (1904); Roberts v. Cobb, 103 N. Y. 600 (1886); Beatty v. Western College, 177 Ill. 280 (1898); First M. E. Church v. Donnell, 110 Iowa 5 (1899); Albert Lea College v. Brown, 88 Minn. 524 (1903); Lasar v. Johnson, 125 Cal. 549 (1899). But if no act be done or liability incurred on the faith of the subscription, it may be revoked, and it is revoked by the death of the subscriber. Pratt v. Trustee, 93 Ill. 475 (1879); Prest. Church v. Cooper, 112 N. Y. 517 (1889); Church v. Kendall, 121 Mass. 528 (1877).

Divergent views are taken of this problem and it is held in some jurisdictions that the acceptance of the subscription by the trustees of the charity implies a promise on their part to execute the work contemplated, and this is sufficient to support the subscriptions. Trustees v. Haskell, 73 Me. 140 (1882); Collier v. Bapt. Ed. Soc., 8 B. Mon. (Ky.) 68 (1897); Helpenstein's Estate, 77 Pa. St. 328 (1879); Martin v. Meles, 179 Mass. 114 (1901); N. Ec. Soc. v. Matson, 36 Conn. 26 (1869); Wesleyan College v. Higgins, 16 Ohio St. 20 (1864). The objection to this view is that the duty of the payee to carry out the purpose of the subscription would arise from his trusteeship and not from a contractual promise to accomplish the object. Johnson v. Alterbein Univ., 41 Ohio St. 627 (1885); Church v. Cooper, *supra*.

A few jurisdictions hold that the promises of the subscribers mutually support each other. Higert v. Ind. Asbury Univ., 53 Ind. 326 (1876); Christian College v. Hendley, 49 Cal. 347 (1874); Edinboro Acad. v. Robinson, 37 Pa. 210 (1860); Allen v. Duffie, 43 Mich. 1 (1880); Rothenberger v. Click, 22 Ind. App. 288 (1899). In jurisdictions where there exists a limitation upon the right of a beneficiary to sue upon a contract to which he is not a party, this doctrine is rejected. Pembroke v. Second Precinct Church v. Stetson, 5 Pick. (Mass.) 506 (1827); Church v. Cooper, *supra*; Church v. Kendall, *supra*.

Some courts have placed the right of recovery, where work has been done, upon the ground of estoppel invoked against the promisor. Reimensnyder v. Gans, 110 Pa. 17 (1885); Wesleyan Sem. v. Fisher, 4 Mich. 515 (1857).

CONTRACTS—EXTENSION OF TIME OF PAYMENT—An agreement by the creditor to extend the time of payment until the debtor is able to pay the

debt is merely an agreemnt to extend for a reasonable time; it constitutes sufficient consideration for the right to hold property in pledge, and the creditor cannot sue on the debt until the expiration of such reasonable time. Starr Piano Co. v. Baker, 62 So. Rep. 549 (Ala. 1913).

The above principles are in accord with the weight of authority in this country. Where the promise of the creditor is to extend the time of payment or forbear to sue, it is generally assumed to contemplate a reasonable time. Hockerbury v. Meyer, 34 N. J. L. 346 (1871); Howe v Taggart, 133 Mass. 284 (1883); Traders' Nat. Bank v. Parker, 130 N. Y. 415 (1892). But a promise to forbear generally has been construed to mean perpetual forbearance. Hamaker v. Eterley, 2 Binn. 506 (Pa. 1810); Clark v. Russell, 3 Watts 213 (Pa. 1848).

Such a promise of extension of time forms a sufficient consideration for the contract. Chemical Co. v. McNair, 139 N. C. 326 (1905; Smith v. Richardson, 77 Mo. App. 422 (1899); Lipmeier v. Vehslage, 29 Fed. Rep. 175 (1887); Silvis v. Ely, 3 W. & S. 420 (Pa. 1843). Where a debt is in fact due, and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, the law implies a promise to pay within a reasonable time. Williston v. Perkins, 51 Cal. 554 (1877); Crooker v. Holmes, 65 Me. 195 (1876); Ubsdell v. Cunningham, 22 Mo. 124 (1856); Nunlz v. Dantel, 19 Wall. 560 (U. S. 1874).

CONTRACTS—ILLEGALITY—COLLUSIVE AGREEMENTS FOR DIVORCE—A written agreement between husband and wife stipulated that the former pay to a trustee a certain sum, part of which was to be given to the wife until a divorce was secured by her and the remainder, after the decree was granted. *Held:* The contract was void as against public policy, and a bill in equity against the trustee would not lie. Wolkovisky v. Rapaport, 102 N. E. Rep. 910 (Mass. 1913).

It is well settled that contracts tending to facilitate divorce are illegal and unenforceable. Hamilton v. Hamilton, 89 Ill. 349 (1878); Jordan v. Westerman, 62 Mich. 170 (1886); Daggett v. Daggett, 5 Paige 509 (N. Y. 1835); Kilborn v. Field, 78 Pa. 194 (1875). A promise by a married person to marry after a divorce has been obtained is invalid. Noice v. Brown, 38 N. J. L. 228 (1878). No recovery will be allowed upon an agreement not to defend a suit for divorce, though a decree would have been granted, whether or not the defence had been made. Beard v. Beard, 65 Cal. 354 (1884). A contract to suppress real cause and to sue upon another ground will not be enforced. Stokes v. Anderson, 118 Ind. 533 (1888); *contra,* Irvin v. Irvin, 169 Pa. 529 (1895). A promise to refrain from taking steps to set aside a decree unlawfully obtained is without consideration. Comstock v. Adams, 23 Kan. 513 (1880). However, to forbear bringing a well-founded suit for divorce is sufficient and legal consideration. Polson v. Stewart, 167 Mass. 211 (1897).

Early English and American cases refused to permit even a voluntary partial dissolution of marriage contracts, the object of which was the separation of man and wife, was held void as against public policy. St. John v. St. John, 11 Ves. Jr. 526 (Eng. 1805); Reed v. Beazley, 1 Blackf. 97 (Ind. 1830). The weight of modern authority holds a contrary view, where an immediate separation is contemplated or has occurred. McGregor v. McGregor, 20 Q. B. D. 529 (Eng. 1880); Walker v. Beal, 9 Wall 743 (U. S. 1869); Effray v. Effray, 110 N. Y. App. Div. 545 (1905); Com. v. Richards, 131 Pa. 209 (1890). But where a contract provides for a future separation, it is void whether made before or after marriage. Watson v. Watson, 37 Ind. App. 548 (1906); Bowes v. Hutchinson, 67 Ark. 15 (1899).

CONTRACTS—STATUTE OF FRAUDS—AGREEMENT TO BE PERFORMED WITHIN A YEAR—The owner of a turpentine farm employed a manager at a monthly salary for a period of two years. The agreement was reduced to writing but was not signed by either party. At the expiration of one year the owner discharged the manager. *Held:* This contract is void under the

Statute of Frauds (code 1907, §4289, subd. 1), because the agreement is, by its terms, not to be performed within a year from the date of the making thereof. Conoley v. Harrel, 62 So. Rep. 511 (Ala. 1913).

This case represents the universal rule wherever the one year clause appears in the Statute of Frauds of the several states. Phelan v. Rio Grande and E. P. Ry Co. *et al.*, 37 S. W. Rep. 165 (Tex. 1896); Jones v. Hay, 52 Barb. 501 (N. Y. 1868); Tuttle v. Swift, *et al.*, 31 Me. 555 (1850); Schumate v. Farlow, 125 Ind. 359 (1890); Butcher Steel Works Co. v. Atkinson, 68 Ill. 421 (1873); Woodal v. Manufacturing Co., 9 Colo. App. 198 (1897); Theyer v. Roberts, 46 Ark. 80 (1885). The unsigned writing is not a compliance with the statute. Barry *et al.* v. Law, 89 Fed. Rep. 582 (D. C. 1802). The year begins to run on the day the agreement is made. Schumate v. Farlow, *supra*.

But even though such a contract is void under the statute, the injured party can recover on a *quantum meruit* for services rendered relying on the agreement. Schute v. Dorr, 5 Wend. 204 (N. Y. 1830).

Some of the states, for example, Pennsylvania, have never adopted the one year clause of the English statute.

CORPORATE DIVIDENDS—APPORTIONMENT BETWEEN LIFE-TENANT AND REMAINDERMAN—Corporate stock was bequeathed in trust, the income to a beneficiary for life with a remainder over, and at the time of the testator's death there was an accumulated surplus in the corporation which was augmented by earnings after his death. *Held:* That a dividend declared after the testator's death should be apportioned so as to give the life-tenants all the income earned after the death of the testator, and reserve to the *corpus* of the estate the amount of the surplus which had accrued at his death. *Re* Stokes' Estate, 87 Atl. Rep. 971 (Pa. 1913).

In ascertaining the rights of life-tenants and remaindermen, the intention of the testator must, of course, control, so far as it can be ascertained. Clarkson v. Clarkson, 18 Barb. 646 (N. Y. 1855); Gibbons v. Mahon, 136 U. S. 549 (1889); Menot v. Paine, 99 Mass. 101 (1868). If his intention cannot be ascertained, then the courts seem to agree that dividends which do not come from earnings of capital belong to the remainderman; *e. g.*, where the fund from which a stock dividend is declared has been created by a sale of a portion of its real estate, or other assets. Heard v. Eldredge, 109 Mass. 258 (1872); *Re* Curtis, 29 N. Y. S. R. 217 (1886); Venton's Appeal, 99 Pa. 441 (1882).

Where, however, dividends are declared from earnings, there is a hopeless conflict of authorities upon the rights of tenant for life and remainderman. By the present English rule, as set forth *In re* Bouch, L. R. 29 Ch. Dw. 635 (Eng. 1885), whether a dividend is to be considered capital or income depends largely on the intention of the corporation, and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, without regard to the time when the profits were earned by the company. Our federal courts have laid down a comparatively similar doctrine in the leading case of Gibbons v. Mahon, 136 U. S. 549 (1889).

In Pennsylvania, on the other hand, the court adopted the rule, that where a corporation, after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock, and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator should be deemed capital, and so much as had accumulated in the life time of the testator should be deemed capital, and so much as had accumulated since his death should be income. This rule is firmly settled in Pennsylvania, although there has been some difficulty, if not inconsistency, in applying it. Earp's Appeal, 28 Pa. 368 (1857); Wiltbank's Appeal, 64 Pa. 256 (1870). *Accord:* Pierce v. Burroughs, 58 N. H. 302 (1878); Lang v. Lang's Exr., 57 N. J. Eq. 325 (1898); Prichett v. Nashville Trust Co., 96 Tenn. 472 (1896); and the principal case.

CRIMES—MURDER—DEGREE—In a murder trial it appeared that the prisoner was guilty in the first degree, or innocent. *Held:* It was not error not to instruct the jury as to murder in the second degree. State v. Mewhinney, 134 Pac. Rep. 632 (Utah 1913).

Ordinarily it is the duty of the jury to fix the degree of the murder as well as to determine the guilt of the prisoner. People v. Holmes, 111 Mich. 364 (1896); State v. Williams, 186 Mo. 128 (1904). But when there is clearly no evidence of one degree of murder present in the case, it is not error to omit the consideration of that degree from the instructions. Cornell v. State, 104 Wis. 527 (1899); State v. Barrington, 198 Mo. 23 (1906). *Dicta* in one case implies that it would be error to instruct as to murder in the second degree if no evidence were present in the case. State v. Tettaton, 159 Mo. 359 (1900). In Pennsylvania, however, it is the right of the jury to ascertain the degree and the right of the prisoner to have it ascertained by them and it is error to withdraw the decision from the jury. Rhodes v. Commonwealth, 48 Pa. 396 (1864); Commonwealth v. Kovovic, 209 Pa. 465 (1904). Even in cases where the murder was clearly of the first degree it has been held that the jury must determine the degree, under instructions dealing with murder in the second degree as well as murder in the first degree. Lane v. Commonwealth, 59 Pa. 371 (1868). But in cases where the act clearly was murder of either the first or second degree, it was held not error not to instruct the jury as to manslaughter. Clark v. Commonwealth, 123 Pa. 555 (1888); Commonwealth v. Crossmire, 156 Pa. 304 (1893). Instructions as to manslaughter, however, should be included except in very clear cases. Commonwealth v. Curcio, 216 Pa. 380 (1907).

EVIDENCE—CRIMES—OTHER OFFENCES—On trial for the larceny of a cow, it had been shown that the hide of the prosecutor's cow was found upon the premises of the accused. Evidence was offered of the finding at the same time of other hides, but not belonging to either. *Held:* It is not admissible in the absence of proof that the animals from which the hides were taken had been stolen or wrongfully obtained by the accused. State v. Bowen, 134 Pac. Rep. 623 (Utah 1913).

It is universally recognized that as a general rule, on the trial of a person accused of a crime, evidence of the commission of a distinct, independent offence is inadmissible. Boyd v. U. S., 142 U. S. 450 (1891); People v. Fitzgerald, 156 N. Y. 253 (1898); Com. v. Wilson, 186 Pa. 1 (1898). But facts and circumstances which tend to prove any of the essential elements of the crime charged are not to be rejected merely because they tend to indicate that the accused has committed another crime. People v. Molineux, 168 N. Y. 264 (1901). Thus the rule does not extend so far as to exclude evidence of the commission of other crimes which have been done in pursuance of a general scheme and which are material to show a motive for the crime charged. Com. v. Robinson, 146 Mass. 571 (1888). Also the principle has no application where it is necessary to prove that an act was not the result of mistake, but was done with criminal intent or with guilty knowledge. Queen v. Francis, L. R. 2 C. C. R. 128 (Eng. 1874). If evidence of another offence is otherwise admissable, it is no objection that the accused was acquitted of it. McCartney v. State, 3 Ind. 353 (1852). When the defendant takes the witness stand, proof of the commission of other crimes may be given in order to affect his credibility. State v. Hummer, 62 Atl. Rep. 388 (N. J. 1905).

There is a tendency among the cases to recognize that the similarity between past actions to the action in question has a material probative value. Where the similar crimes have occurred at about the same time as the crime charged, there has not been much hesitancy about admitting evidence of the former. People v. Farrell, 30 Cal. 316 (1866); Com. v. Stone, 4 Met. 43 (Mass. 1842). Disposition to commit a certain class of crime is also taken cognizance of by the courts which, in consequence, admit evidence of crimes which have occurred at a more remote period.

Thus, it has been held, that proof of opportunity to commit adultery in connection with proof of guilty previous inclinations is sufficient to put the case before the jury. Thayer v. Thayer, 101 Mass. 111 (1869). Similarly, on indictment for incest. Prosecutor v. Ball, L. R. A. C. (Eng. 1911). Evidence of previous attempts to rape upon the prosecutrix are admissable, but similar attempts upon other persons are inadmissable. State v. Walters, 45 Ia. 389 (1877).

EXECUTIONS—RIGHTS OF PURCHASER—A creditor of a mining company obtained a judgment against it, and purchased its property at an execution sale. A mortgagee, whose lien was subsequent and subordinate to the lien of the judgment creditor, and who knew that the title to the property in question was doubtful, endeavored to purchase his rights, but being unable to do so, redeemed by paying amount necessary to the sheriff who in turn paid the money to the judgment creditor. The execution debtor had no title to the property sold, and the redemptioner sued to recover the money paid out by him. *Held:* A purchaser at an execution sale has no right to recover the purchase money paid by him from the execution creditor merely because the execution debtor has no title to the property sold, and a redemptioner's rights rise no higher than those of the purchaser. Copper Belle Mining Company of West Virginia v. Gleeson, 134 Pac. 285 (Ariz. 1913).

The decision in this case follows the well settled rule that purchasers at execution sales must take notice of the title for which they bid, as the doctrine of *caveat emptor* applies. Osterman v. Baldwin, 73 U. S. 116 (1867); Frost v. Yonkers Saving Bank, 70 N. Y. 553 (1877); Smith v. Wortham, 82 Va. 937 (1887); Barstow v. Beckett, 122 Fed. 140 (1903); Dickson v. McCartney, 226 Pa. 552 (1910). Generally, where the debtor had no title to the property sold, the purchaser at the execution sale has no cause of action against the judgment creditor for the purchase price, but his only remedy is against the judgment debtor. Kerr v. Kerr, 81 Ill. App. 35 (1899); Rosenthal & Desberger v. Mounts, 130 S. W. Rep. 192 (Tex. Civ. App. 1910). But in a few jurisdictions, by judicial construction or express statutory enactment, a *bona fide* purchaser may recover against the execution creditor as well as against the judgment debtor. Rosenberger v. Hawker, 127 Iowa 521 (1905). The better rule seems to be that, unless proceeding upon the ground of fraud or misrepresentation, a purchaser at an execution sale cannot by any independent action recover of either of the parties the amount of his bid. Beall v. Price, 13 Ohio 368 (1844); Branham v. San Jose, 24 Cal. 585 (1864); Reed v. Dyer, 83 Va. 331 (1887). It seems that where the purchase price has been used to pay the debts of the estate, the purchaser is entitled to be subrogated to the rights of the creditors so paid. Davis v. Gaines, 104 U. S. 386 (1881); Duncan v. Gainey, 108 Ind. 579 (1886); Junior Order Building & Loan Association v. Sharpe, 63 N. J. Eq. 500 (1902); Conrad v. Crouch, 68 W. Va. 378 (1910); Rosenthal & Desberger v. Mounts, *supra*. But if the purchaser has been guilty of fraud, his right to subrogation will be denied. Elam v. Donald, 58 Tex. 316 (1883). A *bona fide* purchaser may recover the purchase price from the sheriff, if the funds are still in his hands. *Dicta* in State v. Prince, 54 Ind. 450 (1876).

FRAUDULENT CONVEYANCES—RIGHT OF CREDITORS—An insolvent debtor fraudulently conveyed attached lands to a corporation formed by him for the purpose of taking over the property. The value of the lands so conveyed far exceeded the amount of the judgment under which the writ of attachment had issued. In due time the property was sold, the judgment creditor being the purchaser thereof for an amount less than his judgment. Bill in equity brought by him against the debtor and the corporation to set aside the fraudulent conveyance of the property to the corporation, and to decree the lands absolute in him. *Held:* Deed from debtor to the corpora-

tion is to be set aside as void, and complainant awarded his debt, but he is not entitled to a decree that the lands belong absolutely to him. Bourgeois v. Risley Real Estate Company, *et al.*, 88 Atl. 199 (N. J. 1913).

This is in accord with the general law that a conveyance made in fraud of creditors was at common law and is by statute absolutely void as against creditors. But it is void only as against those creditors who attack it, and then only to the extent of their debts. Payne v. Burks, 4 B. Mon. 492 (Ky. 1844); Smith v. Vreeland, 16 N. J. Eq. 198 (1863); Coons v. Lemieu, 58 Minn. 99 (1894); Tudor v. Tudor, 80 Vt. 220 (1907). A decree avoiding a deed as to creditors of the grantor leaves the deed operative between the parties. McDowell v. McMurria, 107 Ga. 812 (1899); Charles v. White, 214 Mo. 187 (1908); Beasley v. Gauge, 141 Ky. 34 (1910). Such a decree is a decree *sub modo*, and binding only as to such creditors. Boggess v. Scott, 48 W. Va. 316 (1900).

A judgment creditor may, at law, proceed to the sale under execution of lands which his debtor has fraudulently aliened; and the purchaser may, in ejectment, recover them of the fraudulent donee. Flewellen v. Crane, 58 Ala. 627 (1877). Or the judgment creditor may himself purchase the land, and pursue his action in ejectment. Drum v. Painter, 27 Pa. 148 (1855); Mulford v. Tunis, 35 N. J. Law 256 (1871). But the mere fact that the judgment creditor has caused execution to be levied upon the property conveyed will not deprive him of the right to go into equity in order to vacate the conveyance. Fitch v. Rising Sun First National Bank, 99 Ind. 443 (1884); Jeuner v. Murphy, 6 Cal. App. 434 (1907); Webber v. Bank, 198 Mass. 132 (1908). And by the weight of authority where a judgment creditor proceeds to execution and causes the land conveyed to be sold under the execution and himself purchases the property at the sale, he may then file his bill in equity to remove the conveyance as a cloud upon his title. Allen v. Berry, 50 Mo. 90 (1872); Gould v. Steinburg, 84 Ill. 170 (1876). A purchaser at an execution sale has the same rights as the judgment creditor. Spindler v. Atkinson, 3 Md. 409 (1852); Hager v. Shindler, 29 Cal. 47 (1865), approved in First National Bank v. Maxwell, 123 Cal. 360 (1899); Kinealy v. Macklin, 2 Mo. App. 241 (1876); Orendorf v. Budlong, 12 Fed. 24 (1882). But in some jurisdictions it has been held that where a judgment creditor has pursued the property in question to execution and has purchased it at the sale under his execution, he cannot then bring an action in equity to set aside the conveyance. Thigpen v. Pitt *et al.*, 54 N. C. 49 (1853); Cranson v. Smith, 47 Mich. 189 (1881); Betts v. Nichols, 84 Ala. 278 (1887).

INFANT—CONTRACTS—DECEIT—An infant carrying on a lumber business, ordered and received on credit a car load of lumber from a wholesale dealer who had previously sold to the father. The infant did not state in his communication that he was an infant, nor did the dealer know of this fact. When the infant became of age a few months later, he repudated this contract, declaring he would not be bound by it. The dealer brought an action against him for deceit. *Held:* There can be no recovery, for such was not a deceit; and even if it were, it would be practically enforcing the contract to allow recovery. Spangler Co. v. Haupt, 53 Pa. Super. Ct. 545 (1913).

An infant except for necessaries is not competent to bind himself, nor liable on the contracts he has made. Hyer v. Hyatt, Fed. Cas. No. 6, 977 (1827); Hughes v. Gallans, 31 Leg. Int. 3491 (Pa. 1879); Sanger v. Hibbard, 104 Fed. Rep. 755 (1900); Ryan v. Smith, 165 Mass. 303 (1896). In order to evade this rule, the majority of jurisdictions have allowed suit to be brought against the infant in tort for deceit. Where the infant has made false representations inducing the contract such as misstating his age, and thereby led another to act to his injury. Ashlock v. Vivell, 29 Ill. App. 388 (1888); Carpenter v. Carpenter, 75 Ind. 142 (1873); Fitts v. Hall, 9 N. H. 441 (1838); Eakstein v. Frank, 1 Daly 337 (N. Y. 1863); Oliver v. Mc-

Clellan, 21 Ala. 675 (1852). A number of other jurisdictions deny any redress against the fraudulent conduct of infants in any manner connected with a contract. Wilt v. Welsh, 6 Watts 9 (Pa. 1837); Brown v. Dunham, 1 Root 272 (Conn. 1791); Slayton v. Barry, 175 Mass. 513 (1900); Nolan v. Jones, 53 Iowa 387 (1880).

Some courts estop the infant from asserting his true age in such cases. Schmetheimer v. Eiseman, 7 Bush 298 (Ky. 1870); Ryan v. Growney, 125 Mo. 474 (1894); Commander v. Brazil, 88 Miss, 668 (1906); Prouty v. Edgar, 6 Iowa 54 (1888); Blakeslee v. Sincepaugh, 24 N. Y. 947 (1893).

To sustain an action of deceit one of the essential elements that must be proved is a false representation. Upchurch v. Mizell, 70 So. Rep. 29 (Fla. 1905); Connelly v. Brown, 73 N. H. 193 (1905). Mere silence as to a fact is not a matter of law, equivalent to a false representation, unless it amounts to a concealment of a material fact which one is bound in good faith to disclose, with the intent to mislead and defraud. Steward v. Wyoming Cattle Ranch Co., 128 U. S. 383 (1888); Roper v. Sangomen Lodge, 91 Ill. 518 (1879); Iron City Nat. Bk. v. DuPuy, 194 Pa. 205 (1899). Fraud as to title, Thomas v. Murphy, 87 Minn. 358 (1902); Craig v. Hamilton 118 Ind. 565 (1888). As to latent defects in articles sold. Hoe v. Sanborn, 21 N. Y. 552 (1860); Hanson v. Edgerly, 29 N. H. 343 (1854); McAdams v. Cates, 24 Mo. 223 (1857). Intent not to pay is sufficient to sustain the action, fraudulent intent, actual or constructive, being the basis of the action. Swift v. Rounds, 19 R. I. 527 (1896).

INSURANCE—APPLICATION MUST BE MADE PART OF POLICY—EVIDENCE—The Iowa Statute (Code 1897 §1741) provides that no application made by a person obtaining insurance shall be admitted in evidence, unless a true copy thereof shall be attached to or indorsed on the policy. In a suit on a policy of insurance, the defendant tried to show that the plaintiff made false representations in the application although it had not complied with the statute. *Held:* This was not admissible as part of the contract but it might be received to show that contract was obtained by fraud. Bowyer v. Continental Casualty Co., 78 S. E. Rep. 1000 (W. Va. 1913).

The general rule is that the application becomes part of the policy if so intended by the parties. Lee v. Guardian Life Ins. Co., 34 N. J. L. 300 (1881); Jennings v. Chenango Life Ins. Co., Fed. Cases No. 8, 190, (U. S. 1875); Studwell v. Mutual Ben. Life Ass'n of America, 19 N. Y. S. 709 (1892).

The early cases construed statutes modifying this rule (like that governing the principal case) very strictly, holding that by failing to comply with the statute, not only was the application itself rendered inadmissible to show misrepresentations of the insured, but that parol evidence would not be received to show that the insured made false statements therein. Corson v. Iowa Mutual Fire Ins. Ass'n, 115 Iowa 485 (1902); Considine v. Metropolitan Life Ins. Co., 165 Mass. 462 (1896); Johnson v. Scottish Union and N. Ins. Co., 93 Wis. 223 (1896); and this was so even if insured specifically agreed to waive his statutory right. Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460 (1888).

It was early decided that statute did not apply as against the insured, as the company will not be allowed to take advantage of its own neglect. Norristown Title, Trust and Safe Deposit Co. v. John Hancock Mutual Insurance Co., 132 Pa. 385 (1890). Nor will it apply against the insurer where there is no written application. Lennox v. Greenwich Ins. Co., 165 Pa. 575.

The tendency of the later cases in regard to written applications is in accord with the decision in the principal case. Empire Life Ins. Co. v. Gee, 55 So. Rep. 166 (Ala. 1911); Southern Life Ins. Co. v. Hill, 8 Ga. App. 857 (1910); Johnson v. Amer. Nat. Ins. Co., 134 Ga. 800 (1910).

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR NUISANCE ON THE DEMISED PREMISES—In an action against a landlord for injuries caused by a fall on ice formed on the pavement from water discharged from a leaky pipe on the roof, the landlord offered evidence of the lease in which the tenant covenanted to save the landlord harmless from all damage occasioned by the maintenance of a nuisance on the demised premises. *Held:* The evidence is admissible as showing that the landlord did not contemplate the existence of ice on the sidewalk. Cerchione v. Hunnewell, 102 N. E. Rep. 908 (Mass. 1913).

The court based its decision not on the ground that the existence of the covenant relieved the landlord of liability, but rather on the ground that all liability of a landlord for a nuisance maintained on premises within the entire control of a tenant is based upon the fact that the maintenance of such a nuisance must have been contemplated at the time of making the lease. And therefor the existence of such a covenant by the tenant is conclusive evidence that it was not contemplated that the nuisance should be maintained by the tenant.

The landlord remains liable during the tenancy whenever the premises when demised are themselves a nuisance. Fisher v. Thirbell, 21 Mich. 1 (1870); or are in such a condition that a use for the purposes leased must create a nuisance. Krauss v. Brua, 107 Pa. 85 (1884). But he is not liable when the nuisance is created by the tenant. Fehlhauer v. St. Louis, 178 Mo. 635 (1903). A vendor of land on which he has created a continuing nuisance remains liable as long as the nuisance continues, but his vendee is liable only as long as he holds the land. Plumer v. Harper, 3 N. H. 88 (1824). Thus it would seem that the liability of the landlord or vendor is based on the *creation* of the nuisance; that of the tenant or vendee upon the *control* of the premises on which the nuisance exists. For this reason it has been held that a covenant by the tenant does not not relieve the landlord of his liability to a stranger. Ahern v. Steele, 115 N. Y. P. 209 (1889); Ingwerson v. Rankin, 47 N. J. L. 18 (1885). *Contra:* Pretty v. Bickmore, L. R. & C. P. 401 (Eng. 1873). If, then, the liability of the landlord is properly based on his *creation* of the nuisance, it is submitted that he should be liable for it as long as it in fact exists, irrespective of what was contemplated by him when he leased, or what covenants were made by the tenant in the lease.

LANDLORD AND TENANT—RENT OF OFFICE—RIGHT OF TENANT TO USE OUTER WALL—The lessors demised an office on the first floor of their premises. The lessees, without obtaining the consent of the lessors, as required by the lease, affixed flower boxes outside the windows of their office. The lessors brought a bill to restrain this alleged trespass. *Held:* The demise included the outside of the outer wall of the office; and the lessors were not entitled to an injunction. Hope Bros. v. Cowan, 2 Chan. 312 (Eng. 1913).

This decision seems to be an extension of the general rule that the lessee of a portion of a building for business purposes has an exclusive right to the use of the outer walls of the portion of the building so leased by him for the purpose of posting advertisements and notices thereon. Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388 (1872); Lowell v. Strahan, 145 Mass. 1, 12 N. E. Rep. 401, 1 Am. St. Rep. 422 (1887); Baldwin v. Morgan, 43 Hun. 355 (N. Y. 1877); Law v. Haley, 9 Ohio Dec. 785 (1886); Scott v. Fox Optical Co., 38 Pitts. L. J. 368 (Pa. 1891); Carlisle Cafe Co. v. Muse Bros. and Co., 67 L. J. (Ch.) 53, 77 L. T. Rep. N. S. 515 (Eng. 1897); Broadsv. Mead, 159 Cal. 765, 116 Pac. Rep. 46 (1911).

The case of Pevey v. Skinner, 116 Mass. 129 (1874), holding that a provision in a lease that "the lessee may have the right to place signs upon the outer walls of said rooms" imports a *privilege* and not an *exclusive right*, seems to be *contra* to our principal case.

For the subject generally see Wood's Landlord and Tenant, (2d Ed.), §208.

NEGLIGENCE—BREAKING DAM—An upper riparian owner constructed a dam across a stream running through his land. The dam broke, after having collected a large body of water, and a great part of the soil on the farm of a lower riparian owner was washed away. *Held:* The owner of land may dam up the water of a stream on his land and is not liable for accidental bursting, provided he used due care and skill in the construction and maintenance of his dam. Sloss-Sheffield Steel and Iron Co. v. Wilson *et al.*, 62 So. Rep. 802 (Ala. 1913).

This decision is inconsistent with the doctrine of Rylands v. Fletcher, 3 H. L. 330 (Eng. 1868), as it does not bear out the distinction between natural and non-natural uses stated by Lord Cairns. This distinction was made with reference to the particular case of the percolation of water naturally present on the defendant's land, as opposed to the escape of water artificially brought upon that land. Smith v. Kendrick, 7 C. B. 515 (Eng. 1849). If the escape of water is due to some structure maintained by the owner on his land, or to any other alteration of the natural condition of the land, the owner is liable. Hurdman v. North Eastern Railway Co., 3 C. P. D. 168 (Eng. 1878). Consequently it seems clear that the principal case would have been decided differently in England under Rylands v. Fletcher, *supra.*

However, the decision in the principal case is in accord with the great weight of authority in the United States and has been applied, on similar states of facts, even in those jurisdictions which uphold the doctrine of Rylands v. Fletcher, *supra.* Shrewsbury v. Smith, 66 Mass. 177 (1853); City Water Power Co. v. City of Fergus Falls, 128 N. W. Rep. 817 (Minn. 1910). *A fortiori* the American jurisdictions which repudiate the English doctrine uphold the principal case. Losee v. Buchanan, 51 N. Y. 476 (1873).

The two conflicting principles which lead to the different results reached in England and the United States can be stated briefly. The American attitude is that industry should be advanced even though the innocent landowner must often bear the burden in the absence of negligence. Penna. Coal Co. v. Sanderson, 113 Pa. 126 (1886); but see McCune v. Pittsburg & Balto. Coal Co., 238 Pa. 83 (1913), and the discussion on page 000 of this issue. The English doctrine of Rylands v. Fletcher, *supra,* protects the owner of property at all costs and therefore, even in the absence of negligence, the active man who has caused the injury must pay.

NEGLIGENCE—MASTER AND SERVANT—FELLOW SERVANTS—The plaintiff was injured as the result of the negligence of his foreman who, while working with him, carelessly released his hold upon a ladder which he was steadying, throwing the plaintiff to the ground. *Held:* When a foreman or vice principal undertakes work in simple co-operation with other servants, and upon precisely the same footing with them, he becomes for the time being a fellow servant with them, and the employer is not liable for his negligence resulting in injury to another servant. Sorden v. Parker, 53 Pa. Super. Ct. 539 (1913).

The doctrine of fellow service holds a master not liable for injuries to his servant caused by the negligence of another servant in the same employment, unless the negligent servant represented the master. Indiana Car Co. v. Parker, 100 Ind. 181 (1884); Quebec S. S. Co. v. Merchant, 133 U. S. 375 (1889); Ryan v. Cumberland Valley R. Co., 23 Pa. 384 (1854).

"Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated." Labatt, Master and Servant, 1418; Wilson v. Merry, 19 L. T. N. S. 30 (Eng. 1868); Miller v. So. P. R. Co., 26 Pac. Rep. 70 (Ore. 1891); Greenway v. Conroy, 160 Pa. 185 (1894).

But if the master was negligent in employing or retaining in his employ delinquent servants, he is liable. Cunningham v. Washington Mills Co., 26 N. E. Rep. 235 (Mass. 1891); Schaub v. Hannibal, St. J. R. Co., 106 Mo.

74 (1891); likewise if he knew of the dangerous conditions caused by the fellow servant's negligence, Noyes v. Smith, 28 Vt. 59; Snow v. Housatonic R. Co., 8 Allen 441 (Mass. 1864).

NEGLIGENCE—PROXIMATE CAUSE—DUTY TO WARN—The defendant put a boy of eleven to work at cleaning an electric meat grinder without warning him of the dangers of the machine. A fellow servant, in an attempt to render assistance, turned on the electric current which set the machine in motion whereby the boy was injured. *Held:* The defendant's negligence in putting the boy to work on the machine without warning him was not the proximate cause of his injury. Coughlin v. Bland, 87 Atl. Rep. 766 (Md. 1913).

It is a general rule that the servant assumes the risk of all open, obvious and apparent perils, incident to the service he undertakes. Meehan v. Holyoke Street Ry. Co., 186 Mass. 511 (1905). This rule, however, is qualified when the servant, by reason of tender years, is unable to appreciate or understand those perils from his own observation. Western Union Tel. Co. v. Burgess, 108 Fed. Rep. 26 (1901). In such instances it becomes the duty of the master to warn the servant of the existence of the dangers. Sullivan v. Metropolitan St. Ry. Co., 53 N. Y. App. Div. 89 (1900). But a duty to warn does not arise if the youth in fact knows and appreciates the dangers of the employment. Prentiss v. Kent Furniture Mfg. Co., 63 Mich. 478 (1886); Ryan v. Armour, 166 Ill. 568 (1897).

The decision in the principal case is not in accord with the weight of authority. Few rules have received more general acceptance than the one holding a master liable for injuries to a servant caused by the combined negligence of himself and a fellow servant. Morris v. Stanfield, 81 Ill. App. 264 (1898); Chambers v. Woodbury Mfg. Co., 106 Md. 496 (1907). But it is a common occurrence for the courts to look beyond the combined cause and make the question of liability depend on the efficient proximate cause of the injury. Sheridan v. Brooklyn & Newtown Ry. Co., 36 N. Y. 41 (1867); Carterville v. Cook, 129 Ill. 15 (1889); Cheney v. Ocean S. S. Co., 92 Ga. 726 (1893). So where an intervening negligent act can be anticipated the first wrongdoer should remain liable. Lane v. Atlantic Works, 111 Mass. 136 (1872).

PARTNERSHIP—REAL ESTATE—CONVERSION—Two men entered into a partnership to deal in real estate and purchased land for that purpose. Subsequently one filed a bill for a dissolution of the firm and the appointment of a receiver to dispose of the partnership assets. An amended bill was subsequently filed averring that the partners were tenants in common and praying for a sale in partition of their interests. *Held:* While real property belonging to a partnership will be treated as converted into personal property in order to protect creditors of the firm or to adjust the accounting between the partners, yet when such functions are fulfilled it will be regarded as reconverted into realty in the hands of all subsequent holders of the legal title. Fooks v. Williams, 87 Atl. Rep. 692 (Md. 1913).

This decision is in keeping with the general American decisions on the subject. Shanks v. Klein, 104 U. S. 18 (1881); Brewer v. Brown, 68 Ala. 210 (1880); Mauch v. Mauch, 54 Ill. 281 (1870); Foster v. Barnes, 81 Pa. 377 (1876); Moore v. Wood, 171 Pa. 365 (1895); Digg's Adm. v. Brown, 78 Va. 292 (1884); and such real estate retains its character as realty with the above exceptions unless it is otherwise expressly or impliedly agreed, Davis v. Smith, 82 Ala. 198 (1886); Nicholl v. Ogden, 29 Ill. 323 (1862); Maddock v. Astbury, 32 N. J. Eq. 181 (1880); Smith v. Jackson, 6 Edw. Ch. 28 (N. Y. 1833); Darrow v. Calkins, 154 N. Y. 503 (1897); Hiscock v. Jaycox, 12 Fed. Cas. No. 6, 531 (1875).

To constitute real estate partnership property it must be purchased with partnership funds and have been used for partnership purposes, Cox v. McBurney, 4 N. Y. Super. Ct. 561 (1849); Little v. Snedecor, 52 Ala. 167; Tillotson v. Tillotson, 34 Conn. 335 (1867); Chaplin v. Ambrose, 37 Fla. 78

(1896). It is immaterial in which of the partners the title is vested. Lyman v. Lyman, Fed. Cas. No. 8, 628 (1829). A presumption arises that it is partnership property when it appears that it was purchased by the partnership funds and used for its purposes. Hardin v. Jamison, 60 Minn. 343 (1895). But where it only appears that the property is used for partnership purposes the presumption is otherwise, Goeffer v. Kinsinge, 39 Ohio St. 429 (1883); Chamberlain v. Chamberlain, 44 N. Y. Super. Ct. 116 (1878).

In England the rule laid down in Waterer v. Waterer, L. R. 15 Eq. 402 (1872); Essex v. Essex, 20 Bear. 442 (1855), that partnership realty is to be considered as converted into personalty for all purposes, has been enacted into a statute: Brit. Partnership Act (1890), §22, and approved by Canada, *In re* Fulton, 7 Ont. S. Rep. 445 (1904).

PARTNERSHIP—RIGHTS OF CREDITORS TO FUNDS—In proceedings in the court of probate for the distribution of the insolvent estate of a copartnership, and of the two copartners, it appears that the partnership assets were not sufficient to satisfy the claims of the partnership creditors and if ratably divided they would receive a dividend of 5.55 per cent., and that the individual assets of both partners were also insufficient to satisfy the individual creditors, and if they were ratably divided among the individual creditors, the creditors of one partner would receive 18 per cent. divided, while those of the other partner would receive 29 per cent. In the distribution the court rendered judgment dividing the distributable partnership assets among the partnership creditors and the distributable assets belonging to the estate of each partner ratably among the separate creditors of such partner, together with the partnership creditors. Robinson v. Security Co. *et al.*, 87 Atl. Rep. 879 (Conn. 1913).

This decision stands alone and unsupported by any other jurisdiction. The general rule prevailing in England and this country is that firm assets are to be applied in the first instance to the payment of firm debts, and assets of the individual partners to the payment of their individual debts, and not until each are satisfied can one cross over to the other's fund. Smith v. Mallory, 24 Ala. 628 (1854); Dilworth v. Curts, 139 Ill. 508 (1891); McMillen v. Hadley, 78 Ind. 590 (1881); Glenn v. Gill, 2 Md. 1 (1852); Somerset Potters' Works v. Minot, 10 Cush. 592 (Mass. 1852); Davis v. Howell, 33 N. J. Eq. (1880) 72; Egberts v. Woods, 3 Paige, 517 (N. Y. 1832); Black's Appeal, 44 Pa. 503 (1863); Lewis v. U. S., 92 U. S. 618 (1875); *Ex parte* Crowder, 2 Vernon, 706 (Eng. 1715); Read v. Bailey, 3 App. Cas. 94 (1877).

This general rule is by no means universal, for in some jurisdictions firm creditors are bound to exhaust the firm assets before they can proceed against the assets of the individual partners, after which they share ratably with their creditors in their individual assets, Gueringer v. His Creditors, 33 La. Ann. 1279 (1881); Blair v. Black, 31 S. C. 346 (1889); Bardwell v. Perry, 19 Vt. 292 (1847); Pettyjohn v. Woodruff, 86 Va. 478 (1890); Freeport Stone Co. v. Carey's Adm., 42 W. Va. 276 (1896). While in still others the rule is that the individual creditors should be put on equality with the firm creditors by receiving a percentage from the individual assets equal to that received by the firm creditors from the firm assets and the remaining property should be distributed *pro rata* between both classes. Johnson v. Gordon, 102 Ga. 350 (1897); Fayette Nat. Bk. v. Kenney, 79 Ky. 133 (1880).

The general rule was incorporated into the Federal Bankruptcy Act of July 1, 1898, c. 541, §5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424).

PLEADING—DEPARTURE—CONDITIONS PRECEDENT AND SUBSEQUENT—The assured declared that he had performed all of the conditions imposed by his policy. The assurer answered by a general denial, whereupon the assured replied stating facts constituting a waiver or estoppel as to provisions to the effect that the policy should be void "if the subject be or become mortgaged." *Held:* This provision related to a condition subsequent

and the pleading of such facts by reply did not constitute a departure. Western Reciprocal Underwriters' Exchange v. Coon, 134 Pac. Rep. 22 (Okla. 1913).

This decision is in accord with the weight of authority. Tillis v. Ins. Co., 46 Fla. 268 (1903); Louisburg v. Ins. So., 8 Conn. 458 (1831); Ins. Co. v. Friedenthal, 1 Colo. App. 5 (1891); Ins. Co. v. Saunders, 86 Va. 969 (1890); Sweitser v. Mutual Aid Association, 117 Ind. 97 (1888). Primary warranties and conditions subsequent are matters of defence to be pleaded by the defendant and it is not necessary that the plaintiff anticipate such defences and negative them by averring performance. Tillis v. Ins. Co., *supra;* Ins. Co. v. Crunk, 91 Tenn. 376 (1891); Johnston v. Ins. Co., 94 Wis. 117 (1896); Forbes v. Ins. Co., 81 Mass. 249 (1860); Chambers v. Ins. Co., 64 Minn. 490 (1896). On the other hand, when facts constituting a waiver, or excuse for non-performance of a condition precedent, are pleaded by way of reply when they should have appeared in the declaration, there is a departure. Trainor & Worman, 34 Minn. 237 (1885); Eidlitz v. Rothschild, 87 Hun. (N. Y. 1895); Potts v. Pt. Pleasant Land Co., 47 N. J. L. 476 (1885).

An insurance company is bound by a waiver if the person claiming it establishes his position by a preponderance of the evidence, Kingman v. Ins. Co., 54 S. C. 599 (1898); Planing Co. & Ins. Co., 72 Mich. 654 (1888); Ins. Co. v. Edwards, 74 Ga. 220 (1884). Forfeitures are not favored in the law and insurance companies will be estopped to insist on one if they have led the assured to honestly believe that the condition involved has been waived. Ins. Co. v. Eggleston, 96 U. S. 572 (1877); Ins. Co. v. French, 30 Ohio St. 240 (1876); Helme v. Ins. Co., 61 Pa. St. 107 (1869); Ins. Co. v. American, 119 Ill. 329 (1887).

For discussion on condition in insurance policy, see note on page 210 of this issue.

PROPERTY—BUILDING RESTRICTIONS—GARAGE—A restriction in a deed prohibiting the erection of a stable on the granted premises will not prevent the grantee from building a garage. Asbury v. Carroll, 54 Pa. Sup. Ct. 97 (1913).

A garage is not a stable, since the definition of the word stable makes the presence of living animals an essential element in a stable. Beckwith v. Pirung, 134 App. Div. 608 (N. Y. 1909); and it is immaterial whether a garage is or is not as objectionable as a stable, Riverbank Improvement Co. v. Bancroft, 95 N. E. Rep. 256 (Mass. 1911). The same distinction does not apply to carraiges and automobiles, and an easement for carriageway becomes an easement for the use of automobiles. Diocese of Trenton v. Toman, 74 N. J. Eq. 102 (1908).

PROPERTY—BOUNDARIES—MONUMENTS—The grantor by his deed described one course of the boundary as running a certain distance "to the middle of a new street about to be laid out." The street in question was not at the time on the city plan but a portion of it was subsequently plotted and opened, although not extending to the point mentioned in the deed. *Held:* The mention of the point in the new street was the designation of a monument which controlled the description. Felin v. Philadelphia, 88 Atl. Rep. 421 (Pa. 1913).

The general rule is that the boundaries of land, as marked out by definite monuments, will control courses and distances called for, on the ground that such monuments indicate best the intention of the parties. Bartlett *etc.* Co. v. Saunders, 103 U. S. 316. 26 L. Ed. 546 (1880); Oleson v. Keith, 162 Mass. 485, 39 N. E. Rep. 410 (1895); Grier v. Canal Co., 128 Pa. 79, 18 Atl. Rep. 480 (1889). But such monuments must be definitely ascertained and it would seem by the weight of authority that where a street is yet unopened, it is too indefinite and uncertain to be used as a monument. Saltonstall v. Riley, 28 Ala. 164 (1856); Church v. Steele, 42 Conn. 69 (1875); Bradstreet v. Dunham, 65 Ia. 248 (1884). But in Potts v.

Canton *etc.* Co., 70 Miss. 462, 12 So. Rep. 147 (1892), as in our principal case, an unopened and unplotted street was held to be sufficiently definite and certain to be a monument.

TORTS—DOCTRINE OF COMPARATIVE NEGLIGENCE—The instruction by the trial court that the contributory negligence of the claimant would not necessarily bar recovery, but should be a factor in mitigation of damages, is a statement of the doctrine of comparative negligence and is erroneous. Hailey-Ola Coal Co. v. Morgan, 134 Pac. Rep. 29 (Okla 1913).

The doctrine of comparative negligence has been adopted in several states. Atlantic Coast Line Ry. Co. v. Weir, 58 So. Rep. 641 (Fla. 1912); Christian v. Macon Ry. Co., 120 Ga. 314 (1904); Thomas v. Gainesville Ry. Co., 124 Ga. 748 (1907); Miss. Laws, 1910, c. 135. Other states have adopted this doctrine for specific cases. Texas, Acts 31st Leg. 1 Ex. Sess. c. 10; Philadelphia, B. & W. Ry. Co. v. Tinker, 35 App. D. C. 147 (1911). Illinois at one time supported this doctrine, Galena & C. Union R. R. v. Jacobs, 20 Ill. 478 (1858); but later cases absolutely deny that comparative negligence is the rule in that state, City of Macon v. Holcomb, 205 Ill. 643 (1903). The great weight of authority is against the doctrine that contributory negligence is no bar to recovery. Birmingham Light & Power Co. v. Bynum, 139 Ala. 389 (1904); Missouri Pac. Ry. Co. v. Walters, 96 Pac. Rep. 346 (Kan. 1908); Weir v. Haverford Electric Co., 221 Pa. 611 (1908).

Where the wrongful act complained of has been wilful the contributory negligence of the person injured is no defense. McKnight v. Ratcliff, 44 Pa. 156 (1863); Cleveland, C., C. & St. L. Ry. v. Miller, 149 Ind. 490 (1898). But merely gross negligence on the part of the wrongdoer will not estop him from pleading contributory negligence. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9 (1904).

TRUSTS—STATUTES OF LIMITATIONS—AGENCY—In 1883 the plaintiffs employed the defendant, a general maritime agent and broker, to sell a salved cargo, and to pay all expenses and claims attached to the salvage. The defendant made the sale, paid the expenses and had a balance in his hands. The sum was not paid over to the plaintiffs, and it was not shown that they knew the defendant held such sum. In 1912, discovering this money to be due them, the plaintiffs demanded it, and on refusal by the defendant instituted suit. *Held:* The defendant was not bound to keep separate the funds collected for his several customers; the consequential right to mingle the funds established his position as a mere debtor to the plaintiffs and, therefore, the claim is barred by the Statute of Limitations. Henry v. Hammond (1913), 2 K. B. 515 (Eng.).

Where it is found as a matter of fact that an agent to sell, or to collect, or to act in like manner, has, by his contract express or implied, a right to mingle the proceeds of the sale or collection with his own general assets, it will be presumed that he exercises this right when the proceeds are received by him. Langdell, Equity Jurisdiction (2nd Ed.), 93. At that moment the proceeds become the property of the agent. *Idem.* He is thereafter a mere debtor to his principal for an equal sum. Bussing v. Thompson, 6 Duer. 696 (N. Y. 1859); Buchanan Co. v. Woodman, 1 Hun. 639 (N. Y. 1874); Graffe v. Currie, 52 N. Y. Sup. Ct. 554 (1886). The Statute of Limitations, therefore, begins to run from this time. Hart's Appeal, 32 Conn. 522 (1864).

Where, however, he has not that right, or having it, is shown not to have exercised it, he is a trustee for his principal. Wallace v. Castle, 14 Hun. 106 (N. Y. 1878); Power v. Davenport, 101 N. Car. 286 (1888); Frost v. McCarger, 14 How. Prac. 131 (N. Y. 1856). In the latter case there is a conflict of authority concerning the time at which the Statute of Limitations begins to run. By some authorities the Statute does not attach until a demand has been made by the principal or an account rendered by the agent, Clark v. Moody, 17 Mass. 144 (1864); Topham v. Braddick, 1 Taunt. 573 (Eng. 1809); Krause v. Dorrance, 10 Pa. 462 (1848); but in the follow-

ing cases a demand was presumed after a reasonable time, and therefore it was held from that time the Statute started to run. Drexel v. Raymond, 23 Pa. 21 (1854); Rhine v. Evans, 66 Pa. 1192 (1870). A few cases decide that no demand is necessary and the Statute attaches from the time the money was collected. Lawrence v. Smith, 32 Wis. 587 (1873). There is authority for the proposition that in order to bar the Statute the relation must not be that of ordinary principal and agent, but that the former must repose some trust or confidence in the latter, Mark v. Miles, 59 Ill. App. 102 (1895).

The decision in the principal case depended upon the primary conclusion that the defendant was a debtor and not a trustee, although suable at law. Lynde v. Davenport, 57 Vt. 597 (1885); Chase v. Perley, 148 Mass. 289, 294 (1889). If he had been held a trustee, although an informal trustee, the statute would not have run in England. North American Land and Timber Co. v. Watkins (1904), 1 Ch. 242 (Eng.). The court held the relationship one of creditor and debtor, saying that, in the absence of an express agreement to that effect, it could not have been reasonably expected the defendant would keep the funds received on behalf of all his customers separate from his own funds and those of each other. But if the unreasonableness of this expectation justifies a finding of fact that an implied contract existed giving the agent a right to mingle the funds and to use them for his own purposes, thereby becoming a debtor to the individual customers for an equal sum out of his general assets, why is the same conclusion not proper in the case of an attorney collecting judgments and other items for his several clients? No one expects him to open an attorney's account in the bank for each claim he collects. One attorney's account, in which he places no part of his own funds, is amply sufficient. He is a trustee nevertheless. See, however, Com. v. Stearns, 2 Metc. 343 (Mass. 1841); Com. v. Libby, 52 Mass. 64 (1846).

WILLS—DISTINCTION BETWEEN GENERAL AND SPECIFIC LEGACY—A testator by numerous bequests in a will gave to various legatees shares of stock in divers corporations, among them "200 shares of Philada. Traction stock" to a certain legatee. At his death the testator had the exact number of shares bequeathed, except that he had only one hundred, instead of two hundred, shares of Phila. Traction stock. *Held:* The intention of the testator, as gathered from the whole will, indicates that the legacy was specific. Ferreck's Estate, 241 Pa. 340 (1913).

Whether a legacy is general or specific depends upon the intention of the testator to bequeath the very thing described—the specific article itself. Finley v. King, 3 Pet. 346 (U. S. 1830). As equity, wherein wills are construed, abhors all preferences, the presumption of intention is in favor of general legacies. Blackstone v. Blackstone, 3 Watts, 335 (Pa. 1834); Snyder's Estate, 217 Pa. 71 (1907). This presumption, however, is rebuttable. In the principal case the rebutting evidence of intention was gathered from the four corners of the will, and not solely from the words of the bequest itself. O'Day v. O'Day, 193 Mo. 62 (1905). The more usual method is to look for words of identity and distinguishment in the bequest. Robinson v. Cogswell, 192 Mass. 79 (1906); Hayes v. Hayes, 45 N. J. Eq. 461 (1889). Ordinarily, at least, the word "my" is sufficient to earmark the thing and to render the legacy specific. Bothamley v. Sherson, L. R. 20 Eq. 304 (Eng. 1875); Harvard Unit. Soc. v. Tufts, 151 Mass. 76 (1890); Blackstone v. Blackstone, *supra;* Hood v. Hader, 82 Va. 589 (1856). So, relative to annuities, stock, *etc.*, the words "standing in my name." Sleech v. Thornington, 2 Ves. 561 (Eng. 1754); Drinkwater v. Falconer, 2 Ves. 623 (Eng. 1755); Barton v. Cooke, 5 Ves. Jr. 461 (Eng. 1800); Matter of Brown, 42 N. Y. Misc. 444 (1904); Sudham's Est., 13 Pa. 187 (1850). But, to be considered, the intention must appear upon the face of the will; the court must construe the instrument before it, and, as it cannot make a will for the testator, it cannot give weight to the tes-

tator's actual intention as proven by extraneous evidence. Barton v. Cooke, *supra;* Millard v. Bailey, L. R. 1 Eq. 377 (Eng. 1866); Baldock v. Green, L. R. 40 Ch. D. 610, 619 (Eng. 1888); Sporaler's Estate, 107 Pa. 95 (1884).

In general specific legacies are subject to ademption or extinguishment. Blackstone v. Blackstone, *supra;* Harrison v. Jackson, L. R. 7 Ch. D. 339 (Eng. 1877). The test is whether the very thing given forms a part of the testator's estate at the time of his death; if it does not, it is adeemed. Hood v. Haden, 82 Va. 589 (1886). The old distinction, responsive to the testator's intention, as laid down in some of the older cases, Drinkwater v. Falconer, *supra;* Partridge v. Partridge, Cas. *temp.* Talt. 226, IV Gray's Cases on Prop. 886 (1736), between a transmutation voluntarily made by the testator himself and one made through fraud or compulsion upon him no longer obtains. Stanley v. Potter, 2 Cox, 180 (Eng. 1789); *In re* Bridle, 4 C. P. D. 326 (Eng. 1879); Walton v. Walton, 7 Johns. Ch. Cas. 258 (N. Y. 1823); Sudham's Estate, *supra.*

WILLS—SIGNATURE—The caption of the propounded holographic will contained the name of the decedent, but the body of the document was not signed by him. The decedent, subsequent to its composition, declared the paper to be his will in the presence of two witnesses and himself added the following attestation clause: "Signed, sealed, published and declared by the said Cornelius or Corniel F. Phelan to be his last will and testament in the presence of . . . as witnesses." He then read the entire document and requested the witnesses to sign, which they did. *Held:* The name of the decedent, written by himself in the attestation clause, and clearly intended by him to be his signature to his will, was a sufficient signing under a statute providing that a will must be "signed." *In re* Phelan's Estate, 87 Atl. Rep. 625 (N. J. 1913).

A holographic will must meet statutory requirements the same as any other will. Wardwick v. Wardwick, 86 Va. 596, 10 S. E. Rep. 843 (1889). In jurisdictions where the statutes do not use the term "subscribing" the requirement as to signing is satisfied when the signature of the testator appears in any part of the will. Reagan v. Stanley, 11 Lea (Tenn. 1883) 316; Lawson v. Dawson, 21 Tex. Civ. App. 361, 53 S. W. Rep. 64 (1899); *In re* Camp's Estate, 134 Cal. 233, 66 Pac. Rep. 227 (1901). *Contra:* Armant's Succession, 43 La. Ann. 310, 27 Am. St. Rep. 183, 9 So. Rep. 50 (1891). A statute requiring a signature to be "in such a manner as to make it manifest that the name is intended as a signature" is met by a signature in the presence of witnesses, in the margin of the last page, nearly opposite the end of the will. Murguiondo v. Nowlan's Ex'r *et al.,* 78 S. E. Rep. 600 (Va. 1913). Or where the name appears in a final declaratory clause. Dinning v. Dinning, 102 Va. 467, 46 S. E. Rep. 473 (1904). But not where the name appears in the caption merely. Roy v. Roy's Ex'r, 16 Grat. 418, 84 Am. Dec. 696 (Va. 1863).

In Pennsylvania the Act of April 8, 1833, P. L. 249, P. & L. Dig. 1440, requires that a will be signed by the testator, unless prevented by the extremity of his last illness, "at the end thereof." This has been interpreted to mean the end of the will in its obviously inherent case, and not in point of space. Baker's App., 107 Pa. 381, 15 W. N. C. 473 (1885); *In re* Swire, 225 Pa. 188, 73 Atl. Rep. 1110 (1906). Where a clause making a devise, or appointing executors, clearly follows the signature, it has been held to invalidate the entire document. Hays v. Harden, 6 Pa. 408 (1847); Wineland's Appeal, 118 Pa. 37 (1888). But remarks not of a testamentary character following the signature are ignored. Beaumont's Estate, 216 Pa. 350 (1907). An additional unsigned clause, in the absence of evidence to the contrary, will be considered a codicil. Taylor's Estate, 230 Pa. 346 (1911); and so will not invalidate what precedes the signature. Heise v. Heise, 31 Pa. 246 (1858).

WILLS—VESTED AND CONTINGENT GIFT—Bequest to three grandchildren "on their arrival respectively at the age of twenty-one years and in the case of the death of either of my said grandchildren before his or her arrival at the age of twenty-one years without leaving issue him or her surviving, then his or her shares so dying shall go to and be divided between the survivors or survivor"; with a direction that until their majority one-half of the income, interest and dividends of their respective shares should be paid to their mother for their education and support; and a further direction in the codicil that the executors were to hold the shares of the grandchildren in trust until their arrival respectively at the age of twenty-five, and to pay over one-half of the income, interest and dividends of each share to their mother for their education and support, and to accumulate the other half of the income in the meanwhile. *Held:* The legacy to the grandchildren was not contingent but vested. Paxson's Estate, 241 Pa. 452 (1913).

This interpretation follows the cardinal canon of construction that the intention of the testator is the first great object of inquiry. Whether a legacy is contingent or vested depends upon whether the contingency, if any, is annexed to the gift or to the time of payment. Muhlenberg's Appeal, 103 Pa. 587, 592 (1883). If futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute, and the time of payment only is postponed, the gift vests at once. 2 Jarman on Wills (6th Ed.), 1399; Smith v. Edwards, 88 N. Y. 92, 103 (1882). If the question whether a legacy is vested or contingent seems doubtful, the doubt must be resolved in favor of a vested estate. Booth v. Booth, 4 Ves. 399 (Eng. 1799); Letchworth's Appeal, 30 Pa. 175 (1858); Freeman v. Freeman, 141 N. C. 97 (1906). The words "when," "if," "at," "upon," "on arrival" and the like, as applied to the age when the devisee shall take, render such bequest *prima facie* contingent. Seibert's Appeal, 13 Pa. 501 (1850); Travis v. Morrison, 28 Ala. 494 (1856); Locke v. Lamb, 4 Eq. 372 (Eng. 1867); Webb. v. Webb, 92 Md. 101 (1900). But in Furness v. Fox, 1 Cush. 134 (Mass. 1848), a gift to a legatee, to be paid to him if he attain twenty-one, was held to be vested. The rule is the same where the bequest is to a class or in the form of a direction to pay. Leake v. Robinson, 2 Mer. 363 (Eng. 1817). But these expressions are ambiguous, and slight circumstances in the context may be sufficient to show that the attainment of the specified age was not intended as a condition but only to fix the time of actual payment. Bland v. Williams, 3 My. & K. 411 (Eng. 1834); Chew's Appeal, 37 Pa. 23, 28 (1860); Kimball v. Crocker, 53 Me. 263 (1865). If the interest upon a legacy or share of residue is given to the legatee in the meantime till the time of payment arrives, the gift is vested. Provenchere's Appeal, 67 Pa. 463 (1871). The rule is the same where the interest is given to other persons to be applied for the benefit of the legatee. Hanson v. Graham, 6 Ves. 239 (Eng. 1801); Jones v. Mackilwain, 1 Russ. 220 (Eng. 1826); Robert's Appeal, 59 Pa. 70 (1868); Fox v. Fox. L. R. 19 Eq. 286 (Eng. 1875); Zartman v. Ditmars, 37 App. Div. 173 (New York, 1899); but see Johnson v. Terry, 139 Ala. 614 (1904). Where the interest is made applicable to maintenance the argument in favor of the vesting exists in full force. Provenchere's Appeal, *supra*. But it seems that where the interest is given as a common fund for the maintenance of all members of a class, the legacy does not vest. Lloyd v. Lloyd, 3 K. & J. 20 (Eng. 1856). Where there is no gift of an *aliquot* share of the income to any individual child, but only a trust for maintenance out of the income of the whole fund, the gift is not vested. *Re* Parker, 16 Ch. Div. 44 (Eng. 1879). If the gift of interest itself is contingent on the legatee attaining a certain age, so that the interest is to follow the fate of the principal, the principal is not vested. Knight v. Knight, 2 Sim. & St. 490 (Eng. 1826). In some cases where the gift was to a class upon their attaining a certain age, a reference to "the share" of a member of the class dying before that age has been held to show that the members of the class took vested interest. Tierney v. Tierney, 2 Chan. 739 (Eng. 1899); Smith's Estate, 226 Pa. 304 (1910).